

**IN THE ENVIRONMENT COURT  
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA  
KI TAMAKI MAKAU**

**Decision No. [2023] NZEnvC 215**

IN THE MATTER OF

an application for enforcement orders  
under ss 315 and 316 of the Resource  
Management Act 1991 (RMA)

BETWEEN

WHANGĀREI DISTRICT COUNCIL  
(ENV-2023-AKL-000111)

Applicant

AND

VLADISLAV GORBATCHEV

Respondent

Court: Environment Judge J A Smith

Hearing: On the papers

Last case event: 4 September 2023

Submissions: J Dawson for Whangārei District Council

Date of Decision: 9 October 2023

Date of Issue: 9 October 2023

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**DECISION OF THE ENVIRONMENT COURT AS TO COSTS**

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A: Under s 285 RMA, Mr Gorbachev is ordered to pay Whangārei District Council the sum of \$10,000.00 as a contribution towards its costs.

B: Under s 286 RMA, this order may be enforced in the District Court at Whangārei (if necessary).



Whangārei District Council v Gorbachev

## REASONS

### Introduction

[1] The Court granted enforcement orders on the terms sought by Whangārei District Council (**the Council**) in a decision delivered orally on 8 August 2023, with a written record of the decision issued 10 August 2023.<sup>1</sup>

[2] The Council have applied for costs against Mr Gorbachev under s285 of the RMA.

### Background

[3] On 29 September 2022, the Court issued a consent determination<sup>2</sup> on an application for enforcement orders. Within three months or so, Mr Gorbachev appeared to have complied with the orders. By May 2023 the Council was getting complaints as to the property again.

[4] The Council undertook an investigation which found there were appliances being stored on the property and items were being advertised for sale.

[5] Although orders were previously made, it was at least arguable that future compliance was not required in terms of the September 2022 order. In July 2023, the Council sought orders on almost identical terms, with some additional provisions including that actions could not be recommenced.

### Orders in 2023

[6] Orders were granted that (in summary) Mr Gorbachev cease and not recommence bringing whiteware or appliances to the property, that all existing stored whiteware and appliances be removed from the property, and materials, debris and waste product be removed. The orders remain in effect for three years.

### Application for costs

[7] The Council applied for an award of costs against Mr Gorbachev, at the higher

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<sup>1</sup> *Whangarei District Council v Gorbachev* [2023] NZEnvC 167.

<sup>2</sup> *Whangarei District Council v Gorbachev* [2022] NZEnvC 181.

end, if not on an indemnity basis, for the following reasons:

- (a) this is the second occasion on which it has been necessary for the Council to seek enforcement orders against Mr Gorbachev for a clear contravention (indeed the same contravention) of the District Plan;
- (b) Mr Gorbachev explicitly agreed to the terms of the first enforcement orders and therefore must be taken to have understood them and their importance;
- (c) this current non-compliance is a clear and flagrant breach and further non-compliance. It was submitted that Mr Gorbachev's prior agreement to the orders is an aggravating circumstance to this application and an award of costs;
- (d) Mr Gorbachev opposed the Council's current application. His opposition amounted to a challenge of the Council's right of inspection under warrant and an assertion that goods were not being sold from the property;
- (e) Mr Gorbachev further asserted that the Council Officers were strangers to him.<sup>3</sup> However, none of Mr Gorbachev's assertions had any merit or basis and they were roundly disposed of by the Court. No meaningful arguments of substance were offered by Mr Gorbachev;<sup>4</sup> and
- (f) the only evidence by Mr Gorbachev offered to support his assertions was an undated, and very brief "affidavit" and his statements given orally to the Court. However, he did not offer anything of substance.

[8] The Council incurred legal costs totalling \$13,015.00 (including GST and disbursements).

[9] In addition, there was a total cost in Officer time of \$6,274 (including GST). Mr

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<sup>3</sup> *Whangarei District Council v Gorbachev* [2023] NZEnvC 167, at [15].

<sup>4</sup> *Whangarei District Council v Gorbachev* [2023] NZEnvC 167, at [6], [9], and [12].

Dawson acknowledged that Council Officer's time is not normally recoverable. It was nevertheless submitted that the quantum of time/cost incurred by Council is relevant to the award of costs in that it represents a cost to the ratepayers, which would have been avoided, had Mr Gorbachev complied, and continued to honour the original enforcement orders.

### **Mr Gorbachev reply**

[10] No reply was received from or on behalf of Mr Gorbachev in relation to the costs application.

### **Costs in the Environment Court**

[11] Under s 285 of the Resource Management Act 1991, the Environment Court may order any party to pay any other party the reasonable costs and expenses incurred by the other party.

[12] Section 285 confers a broad discretion. There is no scale of costs under the RMA. The Environment Court Practice Note 2023 sets out guidelines in relation to costs. However, the Practice Note does not create an inflexible rule or practice.<sup>5</sup>

[13] There is no general rule in the Environment Court that costs follow the event.<sup>6</sup> The Environment Court, unlike the High Court, does not have a general practice that a successful party is entitled to costs unless there are special circumstances in which it would be fairer to depart from that rule.<sup>7</sup> The purpose of a costs award is not to penalise an unsuccessful party but to compensate a successful party where that is just.<sup>8</sup> However costs are more likely to follow the event in enforcement proceedings.<sup>9</sup>

[14] When considering an application for costs the Court will make two assessments: first whether it is just in the circumstances to make an award of costs and second, having determined that an award is appropriate, deciding the quantum of costs to be

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<sup>5</sup> *Canterbury Regional Council v Waimakatiri District Council* [2004] NZRMA 289 at [21].

<sup>6</sup> *Culpan v Vose* A064/93.

<sup>7</sup> *Culpan v Vose* A064/93.

<sup>8</sup> *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385.

<sup>9</sup> *Auckland Council v Imperial Homes Norwest Limited* [2019] NZEnvC 194, at [28]-[29].

awarded.<sup>10</sup>

[15] In determining the quantum of costs awards the Environment Court has declined to set a scale of costs. The range of cases that come before this Court is so great and the circumstances of proceedings are so diverse that devising a fair scale would be at least very difficult and likely to have so many exceptions that it could not truly be used as a scale. Nonetheless, experience has shown that many of the Court's awards have tended to fall within four bands, as follows:

- (a) no costs, which is normally the position in relation to plan appeals under Schedule 1 to the Act or in cases where some aspect of the public interest counts against any award being made;
- (b) standard costs, which generally fall between 25 – 33% of the costs actually and reasonably incurred by a successful party (sometimes referred to as the “comfort zone”);
- (c) higher than standard costs, where certain aggravating factors are present as discussed below; and
- (d) indemnity costs, which are awarded rarely and in exceptional circumstances.

[16] Section 10.7(j) of the Court's Practice Note 2023 lists six potential aggravating factors that are given weight in the assessments of whether to award costs and what the quantum should be if they are present in a case:<sup>11</sup>

- (a) where arguments are advanced without substance;
- (b) where the process of the Court is abused;
- (c) where the case is poorly pleaded or presented, including conducting a case

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<sup>10</sup> *Re Queenstown Airport Corporation Limited* [2019] NZEnvC 37.

<sup>11</sup> *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587.

in such a manner as to unnecessarily lengthen the hearing;

- (d) where it becomes apparent that a party has failed to explore the possibility of settlement where compromise could have been reasonably expected;
- (e) where a party takes a technical or unmeritorious point and fails; and
- (f) whether any party has been required to prove facts which, in the Court's opinion having heard the evidence, should have been admitted by other parties.

### **Evaluation**

[17] I consider the Council acted responsibly in bringing the proceedings. I would have thought it would have been obvious to Mr Gorbachev that he could not recommence bringing whiteware and appliances to the property however he did.

[18] This was a flagrant breach of the District Plan for a second time. Mr Gorbachev has put the Council, a public authority, to unnecessary expense by recommencing activities he knew were in breach of the District Plan. I do note however the Courts comment that the framing of the first orders did leave room for argument that future compliance was arguably not required by those orders, thus necessitating this second application.<sup>12</sup>

[19] In reaching its decision, the Court found Mr Gorbachev's evidence unreliable and clearly preferred the Council's evidence.<sup>13</sup> Mr Gorbachev raised arguments that were misconceived and poorly pleaded. These were dismissed by the Court.<sup>14</sup>

[20] I note that, to the extent that they are not met by an award of costs, the Council costs fall upon public funds.

[21] The Court has been reluctant in the past to award costs in the same sum as the

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<sup>12</sup> *Whangarei District Council v Gorbachev* [2023] NZEnvC 167, at [18].

<sup>13</sup> *Whangarei District Council v Gorbachev* [2023] NZEnvC 167, at [17].

<sup>14</sup> *Whangarei District Council v Gorbachev* [2023] NZEnvC 167, at [14] – [15].

general charge-out rate for the Council for inspections and the like. In any case, the Council does not appear to be seeking to recover Officer costs. Rather the information has been provided to lend context to the overall costs incurred in bringing these proceedings. I do make the comment that it is unfortunate that the Council Officers had to undertake further investigation and appear before the Court to give evidence for this matter when they could have been better engaged in other work that could have been charged at the same rate.

[22] The Council did not seek an award of costs in its first application. Further it could have sought the wording now required. That they did not goes to quantum of costs rather than any award.

[23] The case for a costs award is compelling:

- (a) Mr Gorbachev was aware of the planning constraints;
- (b) his reaction to council officers was obstructive (bordering on aggressive);
- (c) he continued to breach the plan even after these proceedings were set down for hearing; and
- (d) he denied a breach to the Court notwithstanding the clear affidavit, oral and photographic evidence.

[24] In considering quantum I would have been minded to see this as an exceptional case and award indemnity costs (excluding council officer costs) as sought. However, the council should have sought the broader wording in the first application and this would have avoided these proceedings. This cannot significantly discount the order however because Mr Gorbachev has clearly ignored his obligations and placed Council Officers in a stressful situation.

[25] I consider the Council has made a strong case to support an award of costs well above the comfort range.


[26] Given the legal costs of around \$13,000, I consider an award of \$10,000.00 is

appropriate. In doing so I conclude that the costs of Mr Gorbachev's wilful refusal to comply with the plan provisions when he had agreed to an enforcement order justifies a significant costs response. I cannot see a basis to visit more of the Councils costs on the ratepayer.

### **Outcome**

[27] Under s 285 RMA, Mr Gorbachev is ordered to pay Whangārei District Council the sum of \$10,000.00 as a contribution towards its costs.

[28] Under s 286 RMA, this order may be enforced in the District Court at Whangārei (if necessary).



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**J A Smith**  
**Environment Judge**

